STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 22, 2005
v	No. 251019 Oakland Circuit Court
YUTAKA KURODA, Defendant-Appellant.	LC No. 03-188836-FC

Before: Kelly, P.J., and Saad and Smolenski, JJ.

PER CURIAM.

A jury convicted defendant Yutaka Kuroda of three counts of first-degree criminal sexual conduct (CSC-I).[1] The trial court sentenced defendant to three concurrent terms of twelve to twenty years in prison for each conviction. Defendant appeals his convictions and sentences, and we affirm.

The prosecution accused defendant of sexually molesting the victim, his adopted daughter and his wife's twelve-year-old daughter by a previous marriage.[2] At trial, defendant conceded in his opening statement that he had sexually molested the victim, but claimed that he had not sexually penetrated her. Accordingly, under defendant's theory of defense, he could not be found guilty of CSC-I, which requires that the prosecution prove that defendant sexually penetrated the victim.

I. *MIRANDA* WARNINGS

Defendant argues that the trial court improperly denied his pretrial motion to suppress his confession because he did not properly waive his *Miranda*[3] rights. Defendant says that the translator used by police to translate his *Miranda* warnings improperly translated the warnings, and that defendant could not have made a knowing and intelligent waiver of his rights.[4] Our

[1] MCL 750.520b.

[2] After his marriage to the victim's mother, defendant adopted the victim as his own daughter.

[3] *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[4] Defendant's first language is Japanese, and though he is not fluent in English, he understands (continued…)

Supreme Court has articulated the following standard of review regarding a trial court's ruling that a defendant has made a "knowing and intelligent" waiver of his *Miranda* rights:

> "Although engaging in de novo review of the entire record, this Court does not disturb a trial court's factual findings regarding a knowing and intelligent waiver of *Miranda* rights unless that ruling is found to be clearly erroneous. Credibility is crucial in determining a defendant's level of comprehension, and the trial judge is in the best position to make this assessment." [*People v Daoud*, 462 Mich 621, 629; 614 NW2d 152 (2000), quoting *People v Cheatham*, 453 Mich 1, 30; 551 NW2d 355 (1996) (internal citations and quotations omitted).]

The legal standard is clear: to be effective, a waiver must be made (1) voluntarily, and (2) knowingly and intelligently. *Daoud*, *supra* at 633, citing *Miranda v Arizona*, 384 US 436, 444, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966) and *Moran v Burbine*, 475 US 412, 421; 106 S Ct 1135; 89 L Ed 2d 410 (1986). A court is to consider the "totality of the circumstances" surrounding the interrogation of a defendant. *Daoud*, *supra* at 633-634, citing *Moran*, *supra* at 421. To accomplish this, a court must consider the defendant's "age, experience, education, background, and intelligence, and . . . whether he has the capacity to understand the warnings given him, the nature of his [*Miranda*] rights, and the consequences of waiving those rights." *Daoud*, *supra* at 634, quoting *Fare v Michael C*, 442 US 707, 725; 99 S Ct 2560; 61 L Ed 2d 197 (1979).

Here, prosecution witness Jason Brake, who translated between the police and defendant, testified at the suppression hearing that he accurately translated the *Miranda* warnings into Japanese. He provided a statement, written in Japanese, of what he told defendant. Defendant presented the expert testimony of Izumi Suzuki, who was qualified by the trial court as an expert in the field of English-to-Japanese translation. Suzuki testified that Brake erroneously translated some portions of the *Miranda* warnings. She opined, for example, that instead of telling defendant that he "had the right to remain silent," Brake told defendant that he had the right to "be quiet." Suzuki also opined that the words Brake used to translate "anything you say can and will be used against you" can also be interpreted to mean "to you" or "for you."

The police detective who interviewed defendant said that defendant was instructed to stop Brake if he did not understand any of his *Miranda* rights, and that defendant did not do so. The detective also testified that defendant's answers to questions were responsive to the questions being asked and that occasionally, defendant spoke English during the interview.

At trial, Brake further testified that during the interview, defendant would often answer questions posed to him in English before Brake began interpreting the questions to Japanese.

At the beginning of the interview, defendant denied any inappropriate contact with the victim, but eventually he confessed to placing his hands on her genital areas, and to penetrating the victim's vagina with a finger on several occasions.

(…continued)

some English, and can speak some English.

While it appears that defendant raised legitimate questions concerning the accuracy of Brake's translation of the *Miranda* warnings, our review of the record leads us to conclude that the totality of the circumstances supported the trial court's decision. The trial court ruled, correctly, in our view, that defendant could not have reasonably believed that his confession would be used "for him" in court. Furthermore, there was evidence that defendant understood English, that he could speak some English, and that he would often answer questions posed to him in English even before those questions were translated to Japanese. The record further suggests that defendant was a man of at least average intelligence who was capable of making a voluntary, knowing, and intelligent waiver of his rights. Accordingly, we hold that under the standard of review mandated under *Daoud*, *supra*, the trial court did not clearly err when it denied defendant's motion to suppress his confession.

II. RIGHT OF CONFRONTATION

Defendant erroneously maintains that the trial court denied him his right to confront witnesses against him under the Sixth Amendment Confrontation Clause[5] when the trial court relied upon an affidavit from Brake in denying defendant's motion for reconsideration of the trial court's decision to deny defendant's motion to suppress. A testimonial statement made by an unavailable declarant is admissible only when the defendant had a prior opportunity to cross-examine the declarant. *Crawford v Washington*, 541 US 36, ___; 124 S Ct 1345, 1374; 158 L Ed 2d 177 (2004). Because defendant had ample opportunity to cross-examine Brake, both at the pre-trial suppression hearing, and later at trial, and because we have held that the trial court did not err when it denied defendant's motion to suppress, we hold that the trial court's consideration of Brake's affidavit for defendant's motion for reconsideration is not error, and were we to find error, the error is harmless under any applicable standard of review.

III. COGNATE LESSER OFFENSE

Defendant claims that the trial court erroneously denied defendant's request that the trial court read the jury an instruction on the cognate lesser offense of second-degree criminal sexual conduct (CSC-II). However, a court may not instruct a jury on cognate lesser offenses. *People v Cornell*, 466 Mich 335, 356; 646 NW2d 127 (2002); *People v Apgar*, 264 Mich App 321, 326-327; 690 NW2d 312 (2004). Accordingly, we hold that the trial court properly denied defendant's request.

IV. SCORING OF OV 11

Defendant asserts that the trial court erroneously scored offense variable 11 (OV 11) under the sentencing guidelines at fifty points instead of zero points., and that this Court should remand for resentencing. Under the legislative sentencing guidelines, we must affirm a defendant's sentence if the minimum sentence imposed falls within the appropriate guidelines range, unless the guidelines have been misscored. *People v Babcock*, 469 Mich 247, 261; 666 NW2d 231 (2003), citing MCL 769.34(10).

[5] US Const, Am VI.

Defendant argues that the sexual penetration that forms the basis of a CSC-I conviction should not be scored, and that any sexual penetrations that occurred beyond the sentencing offense should be scored under OV 12 or OV 13. Here, the trial court scored both OV 11 and OV 13. Defendant argues that because each CSC-I conviction involved only one sexual penetration, the trial court should have scored OV 11 at zero. Because the trial court scored OV 11 at fifty points, the guidelines range for defendant's minimum sentence was 135 to 225 months. The trial court imposed a minimum sentence of twelve years (144 months). Defendant states that the appropriate guidelines range would be 108 to 180 months if OV 11 had been scored at zero. Because the minimum sentence of 144 months imposed by the trial court falls within the range that defendant proposes is correct, we hold that remand for resentencing is not required regardless of whether the trial court correctly scored OV 11. See *People v Houston*, 261 Mich App 463, 472-475; 683 NW2d 192 (2004).

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Henry William Saad
/s/ Michael R. Smolenski